ADNAN MAHROF & ORS v. SABARIAH MA'AROF & ANOR

HIGH COURT MALAYA, SEREMBAN
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: NA22NCVC-19-05-2020]
30 JUNE 2022

Abstract – *One who is entrusted to hold a property on trust for the benefit of beneficiaries of the estate, lacks the capacity to transfer the rights, title and interest in the property to a third person. Therefore, any transfer of rights, title and interest in the property obtained by way of void instrument for lack of capacity, would be rendered void and invalid and therefore, defeasible under s. 340(2)(b) of the National Land Code.*

LAND LAW: *Transfer – Validity of – Transfer of land by trustee to nephew on consideration of love and affection – Admission by trustee by way of consent judgment that land held in trust – Whether trustee lacked capacity to transfer beneficial interest in land – Whether registration of title effected by means of void instrument – Whether defeasible – National Land Code, s. 340(2)(b)*

LIMITATION: *Land – Recovery of – Transfer of land by trustee to nephew on consideration of love and affection – Whether trustee lacked capacity to transfer beneficial interest in land – Whether registration of title effected by means of void instrument – Whether application defeated by limitation – Whether applicable period of limitation for recovery of land action was 12 years – National Land Code, s. 340(2)(b) – Limitation Act 1953, ss. 9(1) & 22(2)*

The plaintiffs sought to recover a piece of land which was transferred by their mother, Puan Puteh, to the first defendant ('Sabariah'), the plaintiffs' sibling. The land was transferred in order for Sabariah to obtain a Government loan to build a new house on the land for Puan Puteh and the land was to be charged as security. Although the plan did not materialise, the land was never re-transferred to Puan Puteh. Instead, Sabariah transferred the land to the second defendant, her nephew and Puan Puteh's eldest grandchild, on 7 July 2008 on consideration of love and affection. The plaintiffs only knew about the transfer between the defendants in 2010 and requested for the land to be re-conveyed in order for it to be distributed in accordance with the law of succession but was refused by the second defendant. The plaintiffs thus commenced this suit. It was the plaintiffs' contention that Sabariah held the land as trustee for Puan Puteh and following Puan Puteh's demise, Sabariah lacked the necessary capacity to transfer the beneficial interest in the land to the second defendant. On 3 March 2021, a consent judgment was recorded between the plaintiffs and Sabariah, wherein Sabariah agreed that she had

held the land on trust for Puan Puteh and following Puan Puteh's demise, for the beneficiaries claiming under her. Hence, the action proceeded only between the plaintiffs and the second defendant.

Held (allowing plaintiffs' application against second defendant):

(1) With the entering of the consent judgment, Sabariah's status as trustee of the land had been proven. The consent judgment amounted to an admission by Sabariah that she had held the subject property on trust for Puan Puteh and persons claiming under her. Sabariah was thus incapable of transferring the rights, title and interest in the property to the second defendant and therefore, the registration of the second defendant's title had been effected by means of a void instrument and was thus defeasible under s. 340(2)(b) of the National Land Code. (paras 15, 20 & 28)

(2) The second defendant was not a trustee under an express trust and the plaintiffs were not seeking an order to declare the second defendant as a constructive trustee for the land. Hence, where a trust property was sought to be recovered from persons other than trustee, the applicable provision under the Limitation Act 1953 is s. 22(2), which provides for the limitation period of six years. However, in this case which involved recovery of land, the applicable period of limitation was 12 years, pursuant to s. 9(1) of the Limitation Act 1953. The cause of action accrued on 7 July 2008 when the land was transferred by Sabariah to the second defendant and the action was commenced on 12 May 2020 and was thus within the 12-year limitation period. (paras 32-35)

(3) The plaintiffs, as the beneficiaries of their late mother's estate, were possessed with sufficient *locus standi* to commence and action to protect and preserve the assets of the estate, even if they were not entitled to claim for general and special damages on behalf of the estate, which could only be pursued by the lawful legal representative of the estate. The court thus ordered, *inter alia*, that (i) the transfer of the land by Sabariah to the second defendant was declared void and invalid; (ii) the land was declared to form part of the estate of Puan Puteh; (iii) the second defendant to transfer the land to Sabariah within 14 days of the date of judgment; and (iv) should the second defendant fail to re-transfer the land, the Registrar of the court be empowered to execute the relevant forms to effect such re-transfer and the Registrar of Titles, Seremban be required to register Sabariah as the registered proprietor of the land. (paras 38 & 48)

Case(s) referred to:

Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(refd)***

Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(foll)***

Joseph Hayim Hayim v. Citibank NA [1989] AC 730 ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(foll)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(foll)***
See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal [2021] 6 CLJ 650 FC ***(refd)***
Tan Heng Poh v. Tan Boon Thong & Ors [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316 SC ***(refd)***
Wong Moy (Administratrix of the Estate of Theng Chee Khim (deceased) v. Soo Ah Choy [1996] 3 SLR 398 ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 9(1), 22(1), (2)
National Land Code, s. 340(2)(b), (3)

For the plaintiff - Syafuan Zainuddin; M/s Abdul Hakim Abdul Rahman & Co
For the 2nd defendant - Mohd Nor Hisham Hussain; M/s Norhisam & Assocs

Reported by S Barathi

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The plaintiffs and the first defendant are siblings. The second defendant is their nephew.

[2] The plaintiffs commenced this action to recover a piece of land in Ampangan that is registered in the name of the second defendant.

Material Background Facts

[3] The plaintiffs' case was that, in 1982, their mother, Puan Puteh bin Abdullah, had transferred the land to the first defendant in order for the first defendant to obtain a Government loan for the purposes of building a new house on the land for Puan Puteh. At the time, the first defendant, Sabariah, was a teacher and would have been able to easily obtain a Government loan. The intent – according to the plaintiffs – was for the land to be charged as security for the loan.

[4] Regrettably, these plans didn't come to pass. It transpired that, in order to obtain a housing loan for the purposes of constructing a new house on the land, the authorities required the rental homes that were then located on the land to be demolished. Puan Puteh was not agreeable to this, for this would have meant foregoing the rental that she had been collecting on the rental homes.

[5] Despite this, the land was never re-transferred back to Puan Puteh.

[6] Puan Puteh passed away on 22 July 2007. On 7 July 2008, Sabariah transferred the land to the first defendant, Shahril Nizam. No consideration was paid by the latter to the former. More accurately, the consideration that was recorded was the love and affection between nephew and aunty.

[7] According to the plaintiffs, they only knew about the transfer of the land between the defendants in 2010. They requested for the land to be re-conveyed in order that it may be distributed in accordance with the laws of succession, but the second defendant refused to do so.

[8] The plaintiffs then commenced this suit against the defendants.

The Plaintiffs' Claim

[9] The plaintiffs claimed that the subject land had been held by Sabariah (the first defendant) as trustee for their mother, and that following Puan Puteh's death, Sabariah lacked the necessary capacity to transfer the beneficial interest in the land to the second defendant.

The Second Defendant's Defences

[10] The second defendant's pleaded position was that the transfer had been made by Puan Puteh to the first defendant with the intent that the property be transferred to the second defendant when he attained the age of 18 years. The second defendant was Puan Puteh's eldest grandchild, who had lived with her from an early age.

[11] The second defendant also pleaded that the plaintiffs were barred by limitation from pursuing their action.

The Consent Judgment

[12] On 3 March 2021, a consent judgment was recorded between the plaintiffs and Sabariah, the first defendant. The material portion of this consent judgment recorded as follows:

> Maka Adalah Pada Hari Ini Dihakimi Secara PERSETUJUAN bahawa:
>
> 1. Defendan Pertama adalah memegang hartanah yang dikenali sebagai GM 917, No. Lot 5942, Bandar Seremban, Daerah Seremban, Negeri Sembilan Darul Khusus (dahulunya dikenali sebagai GM 8, No. Lot 5942, Bandar Seremban, Daerah Seremban, Negeri Sembilan Darul Khusus) ("Hartanah tersebut") sebagai pemegang amanah bagi pihak arwah Puteh binti Abdullah (No. K/P: 2008170) dan seterusnya bagi pihak waris-waris arwah Puteh binti Abdullah tersebut;

[13] By the terms of the consent judgment, the first defendant agreed that she had held the subject land on trust for Puan Puteh and, following her death, for the beneficiaries claiming under her.

[14] Trial thus proceeded as between the plaintiffs and the second defendant only.

Analysis And Decision

The First Defendant As Trustee

[15] With the entering into of the consent judgment between the plaintiffs and the first defendant, the status of the first defendant as trustee of the subject land has been proven. Even though the second defendant was not a party to the consent order, and accordingly was not directly bound by the consent order, nonetheless, the issues as between the plaintiffs and the first defendant were settled by virtue of the consent order. Thus, to the extent that these issues affected the outcome of the action between the plaintiffs and the second defendant, the second defendant was bound by them.

[16] Support for this position comes from the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*[1]. The appellants in that case alleged that an order under the Small Estates Distribution Ordinance 1955 had been obtained by fraudulent means by the first to fourth respondents, who subsequently transferred undivided shares in the lands in dispute to the fifth and sixth respondents. The Federal Court held that, due to their failure to defend the claim, fraud was taken to have been proven against the first to the fourth respondents. Jeffrey Tan FCJ stated:

> The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Lyd v. Ajax Insurance Co Ltd* (1974) 2 ALR 321, where the High Court of Australia per Menzies J said "... the plaintiff's cause of action against the insured would merge in the judgment once it was obtained ...") and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed "that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead"). Until set aside, the default judgment was the incontestable proof of fraud by the first to fourth respondents.

[17] The Federal Court went on to hold that the title of the fifth and sixth defendants was defeasible, as they were immediate purchasers who had acquired title from persons tainted with fraud. In other words, the default judgment against the first to fourth respondents established fraud against them, and this finding of fraud operated to defeat the title of the fifth and sixth defendants.

[18] If the plaintiff's cause of action in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* merged into the default judgment and operated to bind the fifth and sixth respondents, so too would the cause of action against the first defendant in the present case. The finding that the first defendant was a trustee of the subject land, which arose out of the consent judgment, would operate to bind the second defendant, which meant that he holds the land subject to the trust.

[19] In my view, the fact that the prior judgment in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* was a default judgment should not make a difference and does not constitute a valid reason for distinguishing that case from the present.

[20] The judgment in default was obtained because the allegation of fraud went unanswered in that case. By contrast, the prior judgment against Sabariah in the present case amounts to an admission by Sabariah that she had held the subject property on trust for Puan Puteh and persons claiming under her. In both cases, the contentions of the plaintiffs must be taken to have been proven.

Whether The Title Of The Second Defendant Is Defeasible

[21] It is well established that a purchaser who had paid the full purchase price of a property becomes the beneficial owner of the property, and the vendor will hold the property as a bare trustee for the benefit of the purchaser pending the registration of the purchaser as proprietor. As a bare trustee, the vendor has no capacity in law to convey title to the property to any other person. A third party who acquires the land from such a vendor will be an immediate purchaser whose title is defeasible under s. 340(2) of the National Land Code.

[22] In the Federal Court decision of *Samuel Naik Siang Ting v. Public Bank Bhd*[2], the question of law for consideration was whether the title of a *bona fide* registered owner without notice can be defeated by a non-registered interest of an assignee under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the appellant. In that case, Majlis Perbandaran Manjung was the registered owner of a piece of land which was subsequently sub-divided into various lots. Pursuant to a joint-venture agreement, the Majlis appointed Bersatu Maju Properties Sdn Bhd as the developer to develop the land into a mixed development project. Between 2001 and 2002, the Majlis and Bersatu Maju sold the sub-divided lots to a number of purchasers. Public Bank Bhd granted these first purchasers' loans to part-finance their respective purchases. As the individual titles to the respective lots were not yet issued, the first purchasers executed deeds of assignment assigning absolutely all their respective titles, rights to and/or interest in the lots in favour of Public Bank. In addition, the Majlis and Bersatu Maju issued Public Bank with letters of undertaking, whereby they both undertook to deliver the documents of title to the lots upon

issuance thereof to Public Bank, to facilitate the execution of the transfer documents in favour of each of the first purchasers and the execution of legal charges in favour of Public Bank. Later, even though temporary documents of title were issued in respect of the lots in question, the Majlis and Bersatu Maju failed to notify and deliver the individual titles to Public Bank. Instead, in 2004, the Majlis and Bersatu Maju entered into various sale and purchase agreements and sold the lots to other third parties, one of whom was Samuel Naik. The titles to the lots were then registered in the name of these new purchasers. When Public Bank discovered the subsequent sales, it lodged caveats on the lots. Public Bank also sued the Majlis and Bersatu Maju and the new purchasers, claiming *inter alia* for a declaration that the first purchasers were the rightful owners of their respective lots, that the sale and purchase agreements between the Majlis, Bersatu Maju and the new purchasers were void, and that the transfers of the lots to the new purchasers were void *ab initio* and that the registration of such transfers be set aside. The High Court allowed Public Bank's claim and set aside the transfer of the lots to the new purchasers. Samuel Naik's appeal to the Court of Appeal was dismissed.

[23] On appeal to the Federal Court, the apex court found that the Form 14A which effected the transfer of the lot to Samuel Naik was a void instrument. Since the Majlis had already received the full purchase price from the first purchasers, it was therefore a bare trustee and not permitted in law to sell or transfer the land to the new purchasers. Therefore, the subsequent sale and transfer to the new purchasers were void *ab initio* as the Majlis did not have any legal or requisite capacity to enter into such agreements. Samuel Naik was an immediate purchaser of the lot from the Majlis, and as such his title to the land was defeasible. Accordingly, Samuel Naik could not enjoy the protection of the proviso to s. 340(3) of the National Land Code. Samuel Naik's title, as a third-party purchaser, was defeasible by the prior unregistered title of an assignee under a deed of assignment in respect of the same property.

[24] The Federal Court stated:

> [W]e hold that MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property); and to borrow the words of Jessel MR in *Lysaght*'s case... "the court will not permit the vendor afterwards to transfer the legal estate to a third person." In other words, MPM in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant).
>
> ...

[66] Under s. 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument.

[67] In "*Tenure and Land Dealings in the Malay States*" by David SY Wong, at p. 364 the author explained the phrase "insufficient or void instrument" for the purpose of s. 340(2)(b) of the NLC as follows:

> (iv) "Insufficient or void instrument" Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained "by means of an insufficient or void instrument". Unlike "forgery", the expression "insufficient or void instrument" is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be regarded by the court as "insufficient" or "void". Some general observations may indicate how wide its domain may be. The reference to the insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. Where the instrument is executed in pursuance of a contract of dealing, the invalidity of contract (*ie*, where the contract is void) would plainly entail that the instrument is void accordingly. The instrument may also be "insufficient" or "void" for reasons relating to the capacity of the parties concerned, or by reason of some formal defect or irregularity. In addition, non-compliance with relevant statutory requirements may also result in the instrument being regarded as "insufficient" or "void".

[68] The same issue was dealt with by our court in *Puran Singh v. Kehar Singh Bahadur Singh* [1937] 1 LNS 51; [1939] 8 MLJ 71 where it was held that the memorandum of transfer in that case was not signed by an authorised attorney as required under ss. 110 and 180 of the relevant Land Code and therefore the said memorandum of transfer was declared to be an insufficient instrument and that the registration by means of the transfer was void by virtue of the proviso of s. 42(iii) of the relevant Land Code which provides that: "If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument, such registration shall be void."

[69] The appellant argued that the respondent's contention that his registered title or interest in the subject lot was defeasible because its registration was obtained by means of insufficient or void instrument was very seriously flawed on the facts of the matter as well as the law on the ground that there was nothing to suggest and there was no evidence to show that the relevant Form 14A was an insufficient or void instrument within the meaning of s. 340(2)(b) of the NLC. The appellant cited the decision of the High Court in *Mook Meng Sun v. Loo Aa Kau & Ors* [2002] 2 CLJ 142; [2002] 2 MLJ 193, where Abdul Aziz J held that for an instrument to be regarded as an insufficient or void instrument, there must be something about the instrument itself that renders it insufficient or void. However in that case, as a matter of fact, the learned judge found that there was no evidence as to that as regards the instrument of transfer.

> [70] In the present case, as we have shown earlier the undisputed facts of the case clearly show that the sale and purchase agreements as well as the deeds of assignment with the earlier purchasers are valid and enforceable; and the subsequent sale and purchase agreements with the new purchasers (including the appellant) are void *ab initio* and of no effect. It follows that their related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a void instrument.

[25] *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal*[3] was another Federal Court case where it was found that the vendor of the property held the property as a bare trustee for the purchaser. The contest in this case was between a beneficial owner of a landed property and a chargee bank. In 1997, Nor Zainur bin Rahmat entered into a sale and purchase agreement with He-Con Sdn Bhd to purchase a three-storey shop office. The purchase price was paid in full. As the issue document of title to the property had not yet been issued, He-Con created an irrevocable power of attorney naming Zainur as the attorney of the property. Zainur later appointed his wife as his substitute attorney. Meanwhile, Zainur passed away in June 2002 and his widow and another person were appointed as administrators of the estate of the deceased. In 2011, the widow discovered that (i) the title to the property had been issued but it was registered in He-Con's name, and (ii) there was also a registered charge in favour of AmBank (M) Berhad to secure a loan facility granted to He-Con. As He-Con defaulted in the repayment of the loan facility, the property was scheduled for auction pursuant to an order for sale. The administrators of Zainur's estate sued He-Con and its directors, and AmBank for the recovery of the property. The High Court found that Zainur was the beneficial owner of the property because Zainur had paid the full purchase price and that He-Con was holding the property as a bare trustee; as a bare trustee, He-Con did not have the power to charge the property in favour of AmBank. However, the High Court also found that AmBank was a *bona fide* party as it had taken all steps to verify the status of the property before the giving of the loan. Therefore, AmBank could proceed with the auction of the property. The Court of Appeal took a different view and set aside the AmBank charge. It found that (i) AmBank was an immediate holder of the charge, (ii) He-Con was only a bare trustee and had no authority in law to sell, transfer or deal with the property; and the learned High Court Judge erred in ruling that AmBank was a *bona fide* party and was not negligent in causing the charge to be registered in its favour.

[26] AmBank's appeal to the Federal Court was dismissed. On the facts, it was held that the administratrix got the better title because her deceased husband had paid for the property in full. This had rendered He-Con a mere bare trustee and the administratrix the equitable beneficial owner of the

property. As such, He-Con had neither title nor interest in the property to be transferred to AmBank. The transaction between He-Con and AmBank resulted in AmBank being the immediate purchaser in the context of the deferred indefeasibility scheme under the Torrens system and s. 340 of the National Land Code. As such, proviso to s. 340(3) did not apply to AmBank, and the fact that AmBank was a *bona fide* purchaser for value without notice was irrelevant.[4]

[27] The Federal Court stated in this case:

> [87] A registered title that is defeasible on account of the vitiating acts committed by their perpetrators, is liable to be set aside by the previous owner who has a good title or by a *bona fide* subsequent purchaser for value, of the property. We need to emphasise here that the previous owner of the property need not be registered. What is required is that the previous owner must have good title. It does not matter whether it is legal or equitable in nature. The act of registration on the Register maintained at the land offices, *ipso facto*, provides such title or interest a shield of indefeasibility, but as could be seen above, a registered title or interest shall not be indefeasible if the vitiating factors can be shown to have been employed in the transaction when such title or interest was obtained. It is an imperative direction by law, couched in a mandatory language. A good title or interest in a property remains as such, regardless of whether it is registered or not. Registration confers on the registered owner, *ipso facto*, the shield of indefeasibility. In the Privy Council in *Frazer v. Walker & Ors* [1967] 1 AC 569 indefeasibility was described as follows:
>
> > The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.
>
> [88] Reverting to our immediate appeal, under the NLC, only a *bona fide* subsequent purchaser for value is protected under the express proviso to s. 340(3) of NLC. In this case before us, it is clear that the fourth defendant had its loan secured by registering a charge over the said loan immediately from the first defendant. At that material time, the first defendant had no longer any interest to be dealt with because it was then only a bare trustee for the deceased. In other words, no interest passed to the fourth defendant when the charge was registered by the fourth defendant. The transaction between the first defendant and the fourth

defendant was a direct and immediate purchase. It was a transaction that was vitiated by s. 340(2) of NLC as it was based on an insufficient or otherwise, void instrument, as the first defendant could not pass any title or interest in respect of the said property to the fourth defendant.

[89] That being the case, the fourth defendant being an immediate purchaser, under the law, it must have its interest by virtue of the registered charge, defeasible. Being an immediate purchaser, the fourth defendant, in the circumstances of this case, cannot invoke the proviso to s. 340(3) of NLC.

[28] In the present case, the fact that the property had been held on trust by the first defendant for the benefit of Puan Puteh and persons claiming under her was established by reason of the consent judgment entered into between the plaintiffs and the first defendant. The first defendant was thus incapable of transferring the rights, title and interest in the property to the second defendant. The title of the second defendant was defeasible under s. 340(2)(b), on the authority of *Samuel Naik Siang Ting v. Public Bank Bhd* and *He-Con Sdn Bhd v. Bulyah Ishak*. The absence of the requisite capacity of the first defendant meant that the registration of the second defendant's title has been effected by means of a void instrument.

Limitation

[29] It was advanced for the second defendant that the plaintiffs' action was barred by limitation, on account of the fact that the suit was only commenced in May 2020, whereas the subject land was transferred to the second defendant in July 2008.

[30] Counsel for the plaintiffs, on the other hand, argued that that limitation did not apply in this case, as the claim was to recover trust property that rightfully belonged to the estate of Puan Puteh. It was advanced by the plaintiffs that s. 22(1) of the Limitation Act 1953 applied.

[31] Section 22 provides as follows:

Section 22. Limitation of actions in respect of trust property

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

A Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order
B obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[32] In my judgment, the applicable provision is not s. 22(1), but rather s. 22(2). The difference between the two is that s. 22(1) deals with the situation where trust property is sought to be recovered from the trustee,
C whereas s. 22(2) applies where trust property is sought to be recovered from persons other than a trustee.

[33] Crucially in this case, the plaintiffs have not sought an order to declare the second defendant as a constructive trustee for the land in question; this prayer was only sought against the first defendant. In the absence of such a
D prayer, the second defendant cannot be said to be a trustee for the property, for he is certainly not a trustee under an express trust. Under s. 22(2), the applicable period for limitation is six years.

[34] Nonetheless, I am of the view that the plaintiffs were not barred by limitation, because the applicable period of limitation was actually 12 years,
E pursuant to s. 9(1). Section 9(1) provides as follows:

Section 9. Limitation of actions to recover land

(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action
F accrued to him, or if it first accrued to some person through whom he claims, to that person.

[35] The cause of action in this case accrued on 7 July 2008, when the land was transferred by the first defendant to the second defendant. The plaintiffs commenced the action on 12 May 2020, which was just within the 12-year
G period for limitation.

Locus standi

[36] In the course of analysing the closing submissions of the parties, it occurred to me that the plaintiffs were not administrators of the estate of Puan Puteh, as letters of administration were yet to be applied for, issued or
H obtained. I invited counsel for the parties to consider this point, specifically whether the issue of *locus standi* of the plaintiffs had been pleaded and whether it may validly be raised in submissions, and whether the plaintiffs were clothed with sufficient *locus* to prosecute the claim, in their capacity as beneficiaries under the estate of Puan Puteh.

I

[37] After considering the additional submissions of counsel, I was of the view that, because the second defendant had not pleaded the issue of *locus standi*, he may not subsequently raise it in closing submissions.

[38] Even if this were not the case, I was of the view that, based on the authority of *Al Rashidy Kassim & Ors v. Rosman Roslan*[5], the plaintiffs as beneficiaries of their late mother's estate were possessed of sufficient *locus standi* to commence an action to protect and preserve the assets of the estate, even if they were not entitled to claim for general and special damages on behalf of the estate, which could only be pursued by the lawful legal representative of the estate. The reliefs claimed by the plaintiffs were merely declaratory in nature and sought to recover the land in question to be subsumed back into the assets of Puan Puteh's estate.

[39] In *Al Rashidy Kassim & Ors v. Rosman Roslan*, the plaintiffs were the grandchildren of one Hj Abu Bakar, and were the lawful beneficiaries of Hj Abu Bakar's estate. They commenced a suit against the defendants, seeking a declaration that the transfer of one of the lands previously held by Hj Abu Bakar to the first defendant was void, because the first defendant had obtained his title by fraud. The first defendant had effected the transfer of a half share of the subject land to himself, using a power of attorney executed in 1986. Evidence was received at trial that Hj Abu Bakar had passed away in 1937, and hence he could not have granted the power to the first defendant.

[40] At first instance, judgment was entered in favour of the plaintiffs.

[41] On appeal, the Court of Appeal allowed the first defendant's appeal, on the basis that the plaintiffs lacked the *locus standi* to prosecute their claim without first obtaining a grant of letters of administration to the estate of Hj Abu Bakar, on the authority of *Deraman & Ors v. Mek Yam*[6]. In *Deraman & Ors v. Mek Yam*, the plaintiffs, who had not taken out letters of administration for the estate of their late father, sought to be registered as co-proprietors of a piece of land registered in the name of the defendant. The majority of the Federal Court held that the plaintiffs were not entitled to the relief sought.

[42] The reason that this was so explained in the Supreme Court case of *Tan Heng Poh v. Tan Boon Thong & Ors*[7]. This case dealt with the question of whether a beneficiary in the estate of his late father was entitled to maintain a caveat over lands comprised in the estate. The Supreme Court affirmed the decision of the High Court removing the caveat, holding that, because the value of the estate remained uncertain pending completion of administration, the appellant was a beneficiary under a trust for conversion, which in turn meant that he had no caveatable interest over the eight parcels of land.

[43] In a trust for conversion, the beneficiary is entitled under the trust not to the assets comprised in the trust itself, but to the proceeds of the sale of such assets, after deducting the liabilities of the estate. Where there are multiple legatees under a will and the properties comprised in the estate cannot be divided without effecting a sale of the properties, the law imputes the existence of a trust for conversion. Because the legatee is said not to possess an interest in the properties under the trust but rather to the proceeds of sale of such properties, he cannot therefore possess or maintain a caveatable interest over such properties.

[44] Returning to the case of *Al Rashidy Kassim & Ors v. Rosman Roslan*: the plaintiffs in that case appealed to the Federal Court, which found that the plaintiffs, as beneficiaries of their grandfather's estate, were possessed of sufficient *locus standi* to commence an action to protect and preserve the assets of the estate, but that they were not entitled to claim for general and special damages on behalf of the estate, which could only be pursued by the lawful legal representative of the estate.

[45] In coming to this decision, the Federal Court cited with approval the Privy Council decision (on appeal from Hong Kong) in *Joseph Hayim Hayim v. Citibank NA*[8], where Lord Templeman stated:

> [A] beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.

[46] The Federal Court in *Al Rashidy* also cited with approval the Singapore Court of Appeal decision in *Wong Moy (Administratrix of the Estate of Theng Chee Khim (deceased) v. Soo Ah Choy*[9], where it was held that special circumstances were not limited to cases where the personal representative had defaulted in recovering the property of the estate. The Federal Court went on to rule that a beneficiary of an estate without letters of administration or grant of probate nonetheless possesses sufficient equity in the estate to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment.

[47] The Federal Court in *Al Rashidy* distinguished *Deraman & Ors v. Mek Yam* on grounds that the plaintiffs in the earlier case had sought to be registered as co-proprietors of the land, rather than commencing an action on behalf of the estate to restore or recover property belonging to the estate.

Orders

[48] For the reasons explained, judgment was entered for the plaintiffs against the second defendant. There were orders as follows:

(i) the transfer of the subject land by the first defendant to the second defendant was declared void and invalid;

(ii) the subject land was declared to form part of the estate of Puan Puteh binti Abdullah;

(iii) the second defendant was to transfer the subject land back to the first defendant within 14 days of the date of judgment (being 29 June 2022);

(iv) should the second defendant fail to re-transfer the land in accordance with para. (iii) above, the registrar of the court be empowered to execute the relevant forms to effect such re-transfer, and the Registrar of Titles, Seremban be required to register the first defendant as the registered proprietor of the land; and

(v) the second defendant was to pay costs of RM20,000 to the plaintiffs.

Endnotes:

1. [2014] 1 CLJ 987.
2. [2015] 8 CLJ 944.
3. [2020] 7 CLJ 271.
4. The summaries of *Samuel Naik Siang Ting v. Public Bank Bhd* and *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* are adapted from the judgment of Vernon Ong FCJ in *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650.
5. [2007] 3 CLJ 361.
6. [1976] 1 LNS 20; [1977] 1 MLJ 52.
7. [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316; [1992] 2 MLJ 1.
8. [1989] AC 730.
9. [1996] 3 SLR 398.